SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 229

THE OLD MONASTERY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

Argument

I. The Indictment Is Fatally Defective Because It Wholly Omits to Plead Any Facts Showing the Plan and Scheme By Means of Which the Alleged Conspiracy Was to Be Consummated.

It is elemental that an indictment should inform the accused of the offense charged, with sufficient particularity to enable him to intelligently interpose his defense.[5]

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[5] *Lynch* v. *United States* (C. C. A. 8), 10 F. (2d) 947, quoting at page 948: "In United States v. Hess, 124 U. S. 483, 8 S. Ct., 31 L. Ed. 516, declared: 'The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged so that it may decide whether

It is similarly fundamental that the accused is presumed to have only such information concerning the alleged crime as can be ascertained from the indictment itself.[6]

The essence of the crime of conspiracy the courts have declared over and over again is the unlawful agreement.[7]

In the indictment at bar, there is not a single line nor syllable of explanation of this "agreement" which is concededly the very heart of the offense. To aver in a pleading that there is an agreement is simply to plead a legal conclusion. Could an agreement in a civil case be properly

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they are sufficient in law to support a conviction, if one should be had.'"; *Boykin, et al.*, v. *United States* (C. C. A. 5), 11 F. (2d) 484, 485; *Elder* v. *United States* (C. C. A. 9) 142 F. (2d) 199, 200; *Belvin, et al.* v. *United States* (C. C. A. 4) 12 F. (2d) 548, 550; *Moore* v. *United States* (C. C. A. 5) 128 F. (2d) 974; *United States Constitution Amendment 6.*

[6] *Lynch* v. *United States, supra,* Footnote 5, states: "Where one is indicted for a serious offense, the legal presumption is that he is not guilty; that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on the presumption that the defendant does not know the facts that the prosecutor thinks makes him guilty and that he is unable to procure and present the evidence in his defense and is deprived of all reasonable opportunity to defend unless the indictment clearly discloses the earmarks, the circumstances and facts surrounding the case of the alleged offense, so the defendant can identify, procure witnesses and make defense to it. *Fontana* v. *United States* (C. C. A.), 262 F. 283, 287; *Miller* v. *United States,* 133 F. 337, 341, 66 C. C. A. 399."

[7] *United States* v. *Kissel,* 218 U. S. 601, 608, 31 S. Ct. 124, 126, 54 L. Ed. 1168; *Braverman* v. *United States,* 125 F. (2d) 293, certiorari granted, 62 S. Ct. 1037, 315 U. S. 653, 86 L. Ed. 1733; *Shannabarger* v. *United States,* 99 F. (2d) 957, 961, states: "It is a settled rule of law that 'In conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged.'"

The Court in *United States* v. *Perlstein,* 120 F. (2d) 276, 280, states: "The gist of any conspiracy charge is not the objective of the conspiracy but the unlawful agreement or combination."

See also: *Kitt* v. *United States* (C. C. A. 4), 132 F. (2d) 920, 921; *Pettibone* v. *United States,* 148 U. S. 203, 13 S. Ct. 542, 37 L. Ed. 419; *Proffitt* v. *United States,* 264 F. 299; *Anderson* v. *United States,* 260 F. 557; *United States* v. *Olmstead, et al.,* 5 F. (2d) 712, 713; *Lynch* v. *Magnavox Co., et al.,* (C. C. A. 9), 94 F. (2d) 883, 889; *Marino* v. *United States* (C. C. A. 9), 91 F. (2d) 691, 693.

plead by simply alleging that the parties "agreed" without a recitation of the *facts* constituting the "agreement" relied upon by the pleader? To state the question is to answer it. Obviously such a pleading which sought to assert rights or impose duties growing out of a specific agreement would state no cause of action. There is no rule of law and certainly no principle of logic or reason that should require less particularity in an indictment charging a crime than in a complaint upon contract in a civil action. If any distinction is justified between the requisite degree of particularity in criminal as distinguished from civil pleading, the emphasis should be upon the former, particularly where, as in the case at bar, the indictment by the magic invocation of the conspiracy statutes transmutes a substantive misdemeanor into a felony and by the same doubtful legerdemain brings within the ambit of jurisdiction in South Carolina a corporation domiciled in Seattle, Washington, 3500 miles distant.

On this point the court below cited the opinion of the Trial Court, overruling the demurrer and motion to quash (*U. S. v. Renken*, 55 F. Sup. 1, 5):

> "The gist of the crime of conspiracy is the unlawful agreement. The counts charging conspiracy in these indictments charge that there was such an unlawful agreement. Its *terms* and *objects* are sufficiently described. It is a well settled principle of law that the unlawful *objects* of a conspiracy need not be described with the same particularity as is required in charging the commission of the substantive crime" (App. 17).[8] (Italics supplied)

We, of course, fully agree that the unlawful *objects* of a conspiracy need not be described with the same particularity as is required in charging the commission of a sub-

[8] R. 17.

stantive crime. But we respectfully submit that the courts below fell into the error of confusing "terms" and "objects". As to the latter, the indictment probably speaks with sufficient particularity. As to the former, it is silent. That omission is the gravamen of our complaint on this point and renders the indictment fatally defective. The contrast between the absence of language describing the terms of the unlawful agreement in this case is striking when compared to other conspiracy indictments which the Fourth Circuit has had occasion to review.[9]

The court below relied upon the *Hill* case (42 F. (2d) 812). It is readily distinguishable. There the use of the word "smuggle" alone removed all uncertainty and ambiguity. For that word, in the language of Judge Parker (*Hill* v. *U. S., supra,* page 814) "has a well understood meaning at common law signifying a bringing on shore or carrying from the shore of goods, wares and merchandise for which the duty has not been paid or goods, the importation or exportation thereof which is prohibited".

In the indictment at bar, there are no words of similar import or elasticity which by their very use alone spell out the elements of the prescribed agreement. The words "buy, sell and deliver" unlike the word "smuggle" have no sinister or criminal connotation.

It is the doing of a *lawful act,* i.e., the buying, selling or delivering of packaged distilled spirits, in an *unlawful* manner, i.e., at prices in excess of ceiling prices, that constitutes the substantive basis for the charged conspiracy. It is this distinction which renders the indictment fatally defective by omitting in any wise to describe the terms of the alleged conspiracy.

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[9] *Belvin, et al.,* v. *United States* (C. C. A. 4), 12 F. (2d) 548, 550; *United States* v. *Direct Sales Co., Inc.* (C. C. A. 4), 131 F. (2d) 835; affirmed; *Direct Sales Co., Inc.,* v. *United States of America,* 319 U. S. 703, 87 L. Ed. 1674.

II. The District Court Had Jurisdiction to Determine the Constitutional Issue Raised by Petitioner's Demurrer.

Petitioner by demurrer claimed that the indictment was invalid in that it contravened the Twenty-First Amendment, its contention being that the application of the Emergency Price Control Act of 1942, as amended, to intoxicating liquors and the regulations promulgated thereunder conflict with Section 2 of Article 21 of the Constitution. The Trial Court, after a scholarly analysis of petitioner's contentions and the precedents applicable thereto, concluded (apparently with reluctance) that it was without jurisdiction to decide the constitutional issue thus presented. It bottomed its assumed lack of jurisdiction upon its construction of the then recently decided *Yakus* case.[10]

While conceding that from the explicit language of Chief Justice Stone the question was open, the District Court arrived at its conclusion by adopting what it conceived to be the true meaning of the *Yakus* case [11] as evaluated by its interpretation of Mr. Justice Rutledge's dissenting opinion. In this we submit the Trial Court was wrong.

District Courts concededly derive their power and jurisdiction from the legislature. The jurisdiction of the district court over the crime of conspiracy is conferred by Criminal Code, Sec. 340, 18 U. S. C. A., Sec. 546. Once conferred, that power is obviously plenary. It is "a broad and comprehensive grant and gives the courts named power to try every criminal case cognizable under authority of the United States subject to the controlling provisions of the Constitution." [12]

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[10] *Yakus* v. *United States,* 321 U. S. 414, 88 L. Ed. 653.

[11] *Yakus* v. *United States, supra,* at page 679.

[12] *Simons* v. *United States,* 119 F. (2d) 539, 544, citing *Patton* v. *United States,* 281 U. S. 276, 298.

Neither the opinion of the Court nor Mr. Justice Rutledge's dissenting opinion considered the question of constitutionality in the perspective of an *indictment for conspiracy.* All that was before the Court was the review of a judgment affirming "judgments of the District Court of the United States for the District of Massachusetts convicting defendants, upon verdicts of guilty, of *violations of the Emergency Price Control Act.*"

Considering that fact, coupled with the express declaration by the Chief Justice [13] that: "We have no occasion to decide whether one charged with criminal violation of a duly promulgated regulation may defend on the ground that the regulation is unconstitutional on its face", it is difficult to comprehend the basis for the conclusion reached by the Trial Court that it lacked jurisdiction to decide the constitutional issue before it in a conspiracy case.

The court below in affirming the District Court's asserted lack of jurisdiction, held that petitioner's remedy lay in the United States Emergency Court of Appeals as prescribed by Section 204(e) of the Emergency Price Control Act of 1942, as amended in June 1944, approximately two months after the decision of the Trial Court. In the light of the pronouncement of the United States Emergency Court of Appeals in *Taub, et al.,* v. *Price Administrator,* now pending before this Court on petition for a writ of certiorari, recourse to the remedy suggested by the court below would have been futile and would have left the petitioner in precisely the position in which it now finds itself on this issue.

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[13] *Yakus* v. *United States, ibid.,* at page 672.

III. The Conspiracy Here Charged Required Participation in the Consummated Substantive Offense of the Same Participants and Hence the Conviction for Conspiracy to Commit the Identical Substantive Offense Is Erroneous.

Four individuals, including the petitioner corporation, were indicted in this case. The substantive crime which it is alleged they conspired to commit consisted of buying, selling and delivering alcoholic beverages at prices in excess of the authorized maximum of the Emergency Price Control Act. The proof showed that but one sale and purchase was made. Twelve Hundred (1200) cases of whiskey were sold by the Old Monastery Company, petitioner here, to its co-defendant, Renken (App. 29 et seq.).[14] The other participants were Harold Ostrow, the then President of the petitioner corporation, and Davis, agent for Renken. No other defendants were named in the indictment (App. 1 et seq.),[15] and no other participants, either by name or otherwise, were alleged in the indictment to have participated in the conspiracy. Thus we have a situation where there is an identity of personnel in the conspiracy and the consummated substantive offense which formed the basis for the alleged conspiracy.

The nature of the substantive offense by its very definition contemplates and connotes the participation of a plurality of persons. One cannot buy except from a seller, nor can one sell except to a buyer. In such a situation the authorities[16] uniformly hold that the so-called conspiracy is itself

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[14] R. 29-63.

[15] R. 1-4.

[16] *Lisansky* v. *United States* (C. C. A. 4), 31 F. (2d), 846, 850; *United States* v. *Zeuli* (C. C. A. 2), 137 F. (2d), 836, 845; *Vannata* v. *United States* (C. C. A. 2), 289 F. 425, 427; *United States* v. *Dietrich*, 126 F. 664, 667; *United States* v. *Hagan*, 27 F. Sup. 814; *Curtis* v. *United States*, 67 F. (2d), 943, 947; *United States* v. *Katz*, 70 L. Ed., 986, 988; *United States* v. *Sager*, 49 F. (2d), 725, 727.

the substantive offense so as to preclude either prosecution or conviction for conspiracy to commit the identical substantive offense.

The most recent pronouncement on the subject is *United States* v. *Zeuli*.[17] In this connection a unique feature of the Emergency Price Control Act has significance because it obviously indicates that the Congress was cognizant of the impropriety of invoking sanctions for a conspiracy to commit substantive offenses requiring plurality of participants. Thus, Section 4(a) not only condemns as unlawful the sale of any commodity in violation of a price schedule but declares it to be unlawful to offer, solicit, attempt or *agree* to do any of the foregoing. Maximum Price Regulation 193, Section 1420.1, and Maximum Price Regulation 445, Section 7.8, both contain language consistent with this statutory proscription, for they not only condemn the sale and delivery of domestic distilled spirits for prices in excess of the regulation but likewise denounce an agreement to do any of the foregoing.

IV. There Was a Total Failure of Evidence to Show That the Petitioner Corporation Was to Receive Any Benefit from the Conspiracy.

Giving the evidence the strongest interpretation in favor of the government and against petitioner, all that can be

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[17] *United States* v. *Zeuli*, supra, Footnote 16, at page 836, the Court stated: "Lower Federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. United States v. Dietrich, C. C., 126 F. 664 (Van Devanter and Munger, JJ); United States v. New York Central & H. R. R. Co., C. C., 146 F. 298 (Holt, D. J.); United States v. Sager, 2 Cir., 49 F. 2d, 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. United States v. Katz, 271 U. S. 354, 355, 46 S. Ct. 513, 70 L. Ed. 986; Gebardi v. United States, 287 U. S. 112, 122, 53 S. Ct. 35, 77 L. Ed. 206, 84 A. L. R. 370."

claimed for it is that the Old Monastery Company sold Twelve Hundred (1200) cases of its whiskey to Renken for $32,000.00, the established and lawful selling price for that commodity. This sale, insofar as the corporation was concerned, was, as characterized by Renken, a government witness: "* * * a regular commercial transaction * * *".

No evidence whatsoever was offered by the government proving or even tending to prove that the corporation received a single penny in excess of the regular OPA price paid to it by draft on Renken upon presentation of bills of lading in the same manner as any other legitimate commercial transaction. On the contrary, the defendant on its behalf, through its General Manager, an outside Auditor, and its bank, established beyond any question that the only payment received for the Twelve Hundred (1200) cases of whiskey which it sold was the lawful consideration paid to it by Renken as aforesaid.

Consequently, the only possible theory upon which the corporation can be held to have been a participant in what the government dramatizes as the "conspiracy" but which in fact was but a single completed sale was through the acts ascribed to its President, Ostrow, by the confessed progenitor of the conspiracy, Davis. According to Davis, he paid Ostrow personally the claimed $16,000.00 in "side money" in cash. While it may be of no legal significance, it may be noted in passing that this payment was allegedly made, not in the office of the company in Seattle, but to Ostrow at San Francisco, eight hundred (800) miles distant.

We are not contending, of course, that a corporation can avoid ressponsibility for conspiracy because of necessity it acts through its representative or agent. Nor do we claim that a corporation can avoid responsibility for its participation in a conspiracy through an agent who has exceeded his authority or acted *ultra vires* in acting for his

corporation in furtherance of such conspiracy. But the fundamental postulate to corporate liability for conspiracy through the acts of its agents and representatives is that such acts *must be for the benefit of the corporation.* Where an agent or officer of a corporation participates in a conspiracy in his official capacity as such officer or agent, or avails himself of the corporation to further the ends of the conspiracy in which he is participating for his own personal advantage, then the rule is clear that liability of the corporation for conspiracy cannot be imputed to it through such acts of its agent.

On this point, textbooks as well as the courts are in universal agreement. Thompson on Corporations (Vol. 7, 3rd Edition, Sec. 5430) declares:

> "A corporation is liable for conspiracy to the same extent as are individuals under like circumstances though the act was outside the scope of the corporate powers * * * A *corporation will not be liable for a conspiracy in which it did not participate but was conducted by officers for their own benefit* * * *".

The principle enunciated in Thompson, *supra,* stems from the landmark case of *New York Central Railroad* v. *United States.*[18] That case, decided in 1908, involved, as the Court will recall, the interpretation of the Elkins Act with respect to rebates. After reaffirming the principle that a corporation may be liable to damages in actions for tort, the Court proceeds to a discussion of the basis for imputing liability to a corporation for the acts of its agents, even though wrongfully done or even against the express orders of the

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[18] 212 U. S. 481, 492, 495, 29 S. Ct. 304, 53 L. Ed. 613.

principal. The basis for liability, declares the Court, is: "because the act is done for the benefit of the principal".[19]

The government's case, instead of showing "benefits" to the corporation growing out of the personal acts of its then president, demonstrates conclusively that the acts attributed to him by Davis, if true, were definitely to its detriment. In this state of the record, there was no evidence imputing liability to the corporation which justified submission of the case to the jury and the Trial Court should have granted petitioner's motion for a directed verdict.

Conclusion

The facts in this case warrant comment on the tendency of prosecuting agencies of the government to invoke the conspiracy statute with not too fine a discrimination as to its justifiable application to a particular case. Courts and writers on legal subjects have noted this tendency with misgiving.

In *Vannata* v. *United States, supra*, Judge Hough commenting on the use of the conspiracy statute in Volstead Act violations (under which, unlike here, sale but not purchase was forbidden) made a cogent observation, which is particularly apt in these strenuous days when new offenses (as at bar) are created daily by administrative fiat under emergency legislation:

> "If any right-minded layman of intelligence were told to read section 29 of the Volstead Act, he would think he knew just what it meant to sell whiskey. If counsel learned in the law then told him that it was optional with the prosecutor to utilize section 37 of the Criminal Code to quadruplicate the penalty, he would incline to think of schoolbook information as to how certain tyrants put their laws on pillars so high that plain citi-

[19] Ibid., Footnote 18.

zens could not mark, learn, and inwardly digest the same. In the long run it is by the opinion of an intelligent laity that laws and their enforcement are judged."

All of which is respectfully submitted.

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